of the Registrar or Collector to comply with the order forthwith."

The appellant has failed to establish a substantive right to the said land, and in the circumstances has not succeeded in satisfying us of his entitlement to be placed in the register under the provision of the section.

For the reasons stated above, we dismiss the appeal with costs and confirm the judgment of the learned Judge.

Deposit is to be retained on account of taxed costs.

Appeal dismissed.

Solicitors: *Sri Ram, Zulkifly & Kumar; Clough Thuraisingham, Sivasubramaniam & Ramdas; Morris Edgar & Paul Raj.*

WONG CHOON MEI & ANOR. v. DR. KULDEEP SINGH & ANOR.

[S.C. (Lee Hun Hoe C.J. (Borneo) Seah & Syed Agil Barakbah S.C. JJ.) October 30, 1984 & April 20, 1985]

[Kuala Lumpur – Federal Court Civil Appeal No. 89 of 1984]

Tort – Negligence – Professional negligence – Person injured after assault treated in Casualty Department of Hospital – X-Rays taken – Person sent home but died the same evening – Internal bleeding from ruptured spleen – Liability of medical officer – Res ipsa loquitur – Rebuttal by proof that medical officer not negligent – Action dismissed by judge – No assessment of damages.

Evidence – X-Rays stated to be misplaced – No independent evidence called – Whether secondary evidence admissible – Evidence Act, 1950, ss. 61-65.

In this case a person had been assaulted and had sustained injuries. He was brought to the Casualty Department of the General Hospital where he was examined by the first respondent. After a physical examination, X-Rays were taken of his right elbow and chest. The X-Rays revealed two fractures of the elbow and the clavicle but the first respondent detected no fractured rib nor did he find the presence of any fluid in chest or abdomen. The person was sent home that same evening. He died fifteen hours or so later and the post-mortem revealed that the cause of death was shock due to internal bleeding from a ruptured spleen brought about by the fractures to his 8th, 9th and 10th left ribs. The appellants sued the respondent for negligence in failing to properly examine or diagnose the extent of the deceased's injuries or prescribe the proper and appropriate treatment. The respondents denied that they were in any way negligent and claimed that the first respondent had done all that was medically necessary to treat the deceased. They stated that the injuries that caused his death were not evidenced from the X-Rays films taken of the deceased. The action was dismissed by the trial judge and the appellants appealed.

Held (Seah S.C.J. dissenting): (1) when a *prima facie* case of negligence against a defendant has been established under the doctrine of *res ipsa loquitur*, the defendant can rebut that case by proving he was not negligent, even though he cannot prove how the accident happened. If the defendant can show a way in which the accident may have occurred without negligence the cogency of the fact of the accident itself disappears and the plaintiff is left as he began, namely that he has to show negligence. If the defendant gives a reasonable explanation which is equally consistent with the accident happening without his negligence as with his negligence he has again shifted the burden of proof back to the plaintiff;

(2) a consideration of the evidence in this case negatives any suggestion of negligence on the part of the first respondent and therefore on the particular facts of this case *res ipsa loquitur* does not apply;

(3) the learned trial judge in this case should have made an assessment of the damages. If no assessment were made and the appeal was allowed, it would mean that the case has to be sent back to the learned judge for assessment. This would cause unnecessary delay, inconvenience and costs.

Cases referred to:-

(1) *Roe* v. *Ministry of Health & Ors.* [1954] 2 All E.R. 131, 136.
(2) *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon* (1874-75) 2 I.A. 87, 102.
(3) *Vincent* v. *Cole* 173 E.R. 1151.
(4) *Strother* v. *Barr* 130 E.R. 1013, 1018.

SUPREME COURT.

G. Varaghese for the appellants.

P.M. Mahalingam, (Senior Federal Counsel), for the respondents.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo): This is an appeal against the dismissal by the learned Judge of a claim in negligence. The appellants/plaintiffs were the parents of Wong Yoke Thong (deceased) and sued as dependants of deceased pursuant to section 7 of the Civil Law Ordinance, 1956. The 1st respondent/1st defendant was a doctor attached to the Casualty Department, General Hospital, Kuala Lumpur and employed by the 2nd respondent/2nd defendant.

On the evening of April 3, 1978 deceased was assaulted and sustained injuries. At about 9.00 p.m. that same evening his father, Wong Choon Mei brought him to the Casualty Department, General Hospital where he was examined by the 1st respondent who was on duty at the time. After a physical examination, 1st respondent sent deceased to the X-ray Department where four X-rays were taken of his right elbow and chest. Deceased came back to 1st respondent with the four X-rays. Two fractures were discovered, one to his right elbow and the other to the lateral end of his clavicle. First respondent detected no fractured rib and neither did he find the presence of any fluid in the chest or abdomen. He therefore gave deceased an anti-tetanus shot, dressed his wounds, applied a slab to the right elbow, supplied him with pain-killing tablets and strapped his shoulder with a collar and cuff. Deceased was sent home the same evening. He was advised to return immediately to the hospital if he experienced any vomitting, giddiness or pain in the stomach. Unfortunately, fifteen hours or so later deceased died at home. A postmortem revealed the cause of death as shock due to internal bleeding from a ruptured spleen brought about by the fractures to his 8th, 9th and 10th left ribs. Six pints of blood were also discovered in his abdominal cavity together with large massive blood clots measuring 8 cm in diameter. Hence, the appellants sued the 1st respondent for negligence in failing to properly examine or diagnose the extent of the deceased's injuries or prescribe the proper and appropriate treatment resulting in deceased's death. The respondents denied that they were in any way negligent and claimed that 1st repondent had done all that was medically necessary to treat the deceased. They stated that the injuries that caused his death were not evidenced from the X-ray films taken of the deceased. They alleged that the injuries could only have been inflicted after the deceased had been examined and treated by the 1st respondent.

The judgment was attacked on various grounds. It was contended that the learned Judge was wrong to accept the suggestion of the respondents that the deceased sustained the fractured ribs and ruptured spleen in a subsequent fight. On the evidence before the court the learned Judge considered that such a possibility could occur but conceded that the acceptance of such a suggestion was mere speculation. The learned Judge made clear that the only issue before her was whether the deceased also suffered the three fractures to his 8th, 9th and 10th ribs causing his spleen to rupture when 1st respondent examined and treated him on the evening of April 3, 1978.

We note that the four X-rays were taken of the deceased's right elbow and chest. None seemed to have been taken of his left side. We also note that the cause of death was shock due to the ruptured spleen brought about by the fractures of the 8th, 9th and 10th left ribs. This could possibly account for the fact that the fractures could not be detected from the X-rays which covered the areas of the right elbow and chest. The best evidence would have been the four X-rays.

The 1st respondent was unable to produce the four X-rays as they were misplaced by the Record Office of the General Hospital. On this the learned Judge remarked as follows at page 34 of the Appeal Record:-

> ". . . . . .In this instance, he was not able to produce them as the Record Office had misplaced them, an occurrence which I am told, is quite common and not unusual at the General Hospital. . . . . ."

If such is still the situation, it is really a disgrace and a sad reflection of the administration of the General Hospital. Something must be done to correct the system and efficiency of the Record Office so that such an occurrence which is "quite common and not unusual" would not happen again at the General Hospital.

The learned Judge did not take the matter further because of the fact that D.W.2 (Dr. Narinder Singh) the Consultant Radiologist had seen the X-rays two weeks after deceased's death and recorded his findings. D.W.2 confirmed that from the two films taken of deceased's chest he did not detect the presence of any fractured rib. Neither did he find any evidence of any fluid in the chest or in the abdominal cavity. He also stated that if the spleen had been ruptured at the time of examination, the blood from the spleen would have collected in the abdominal cavity causing the abdomen to distend. However, he found no evidence of such distention in any of the films. Further, the learned Judge also heard the evidence of D.W. 3, the Consultant Surgeon from the General Hospital. She stated that evidence of a ruptured spleen or a blood clot would also be detected if a patient's pulse rate was higher than the normal rate of 80 per minute. She confirmed that a pulse rate of 100 per minute was a clear indication of blood loss but the pulse rate of 84 per minute which was recorded by 1st respondent as the deceased's pulse rate at the time of examination was no indication of bleeding. In the light of D.W.2's evidence the learn-

ed Judge did not view the non-production of the X-ray films with suspicion.

It was not surprising that the appellants contended that on the facts *res ipsa loquitur* applied. In support references were made to *Charlesworth* on Negligence, 4th Edition, page 42, paragraph 112 and *Roe* v. *Ministry of Health & Others*[1] where Denning L.J., as he then was, remarked at page 136 as follows:-

"The judge has said that those facts do not speak for themselves, but I think they do. They certainly call for an explanation. Each of these plaintiffs is entitled to say to the hospital: 'While I was in your hands something has been done to me which has wrecked my life. Please explain how it has come to pass.' "

In that case after the two appellants were each given an injection containing Nupercaine they became paralysed from the waist downwards. On the evidence the Court of Appeal agreed with McNair J. that none of the respondents was negligent. It could be very misleading merely to quote a particular passage from a judgment which should be read as a whole. Continuing on with his judgment at page 137 Denning L.J. stated clearly:-

". . . . . .that the hospital authorities and Dr. Graham were called on to give an explanation of what has happened. But I think they have done so. They have spared no trouble or expense to seek out the cause of the disaster. The greatest specialists in the land were called to give evidence. [His Lordship then stated the facts as found by the learned Judge and continued:] That is the explanation of the disaster, and the question is: Were any of the staff negligent? I pause to say that once the accident is explained, no question of *res ipsa loquitur* arises."

Each case must be decided in accordance with its particular facts. In the present case the 1st respondent has given his explanation of his examination and treatment of the deceased. He was definite from his physical examination of the deceased and his study of the four X-ray films that there was no broken rib or indication of a ruptured spleen. It is fortunate for 1st respondent that D.W. 2, the Consultant Radiologist, saw the four X-ray films before they were misplaced by the Record Office and was able to give evidence to confirm 1st respondent's finding. D.W.3, the Consultant Surgeon, also gave evidence to say that there was no indication of bleeding as the deceased's pulse rate at the time of examination was 84 per minute. There could be little doubt that a blow caused the fracture of the ribs, resulting in the rupture of the spleen. The respondents' contention is that the fractures occurred after the discharge of the deceased. It was also pointed out that the report of the assault was only lodged on April 4, 1978 after the deceased died. Thus, respondents submitted that they had discharged the burden on them.

When a *prima facie* case of negligence against the defendant has been established under the doctrine of *res ipsa loquitur*, the defendant can rebut that case by proving that he was not negligent, even though he cannot prove how the accident happened. If the defendant can show a way in which the accident may have occurred without negligence, the cogency of the fact of the accident by itself disappears, and the plaintiff is left as he began, namely, that he has to show negligence. It is important that the suggestion of how the accident may have occurred must be shown to be reasonable. If the defendant give a reasonable explanation which is equally consistent with the accident happening without his negligence as with his negligence he has again shifted the burden of proof back to the plaintiff.

The learned Judge apparently considered that the doctrine of *res ipsa loquitur* did not apply to the facts in this case. *Res ipsa loquitur* does not mean that merely because a person is assaulted by a group of ruffians and hurt this implies negligence on the part of the doctor who, in an emergency, examined and treated him. If that is the law then a stage would be reached when no doctor would care to render any assistance to a victim of an accident or assault. I think it is useful to refer to Denning L. J. in *Roe* v. *Ministry of Health & Others*[1] when in dismissing the appeal he concluded his judgment in these words:-

". . . . . .These two men have suffered such terrible consequences that there is a natural feeling that they should be compensated. But we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their own safety than of the good of their patients. Initiative would be stifled and confidence shaken. A proper sense of proportion requires us to have regard to the conditions in which hospitals and doctors have to work. We must insist on due care for the patient at every point, but we must not condemn as negligence that which is only a misadventure . . . . . ".

The appellants submitted that the defence was untenable. The learned Judge did not think so. I think a consideration of the evidence in the case negatives any suggestion of negligence on the part of the 1st respondent and I see no reason to differ from the conclusion reached by the learned Judge. I do not think on the particular facts of this case *res ipsa loquitur* is applicable. However, there is justification in the complaint of the appellants that

the learned Judge did not quantify damages. It would be of great assistance to an appellate court if an assessment was made of the damages by the learned trial Judge. If no assessment was made and the appellate court allowed the appeal, then it would mean sending the case back to the learned Judge for assessment. This would cause unnecessary delay, inconvenience and costs. The amount of compensation or damages to be awarded is particularly within the province of the trial court and an appellate court will not interfere unless the amount is arrived at on a wrong principle or is manifestly excessive or inadequate.

In this case it is purely coincidental that on the evidence I agree with the learned Judge that the claim cannot succeed. I would therefore dismiss the appeal with costs. Deposit to respondents on account of taxed costs.

Syed Agil Barakbah S.C.J. concurred.

Seah S.C.J. (dissenting): I need not refer to the relevant facts which have been succintly set out in the judgment of the learned the Chief Justice. Suffice for me to say that the crux of the defence of the respondents was that the ruptured spleen, intensive internal bleedings and massive blood clots which resulted in the death of the deceased could only had been inflicted after the deceased had been examined and treated by the 1st respondent. It was common ground that the onus of proving this defence rested on the respondents.

Four X-rays were taken when the deceased was first admitted to the Casualty Ward of the General Hospital where he was examined and treated by the 1st respondent. The production of these X-rays would be the best evidence to establish whether or not the deceased had sustained fractures to his 8th, 9th and 10th left ribs and the ruptured spleen, when he was first brought to the hospital. The 1st respondent was unable to produce these 4 X-rays and he stated that they were misplaced by the Record Office of the General Hospital. As a result of this, secondary evidence was allowed to prove the defence. The first question which had to be considered was whether or not this secondary evidence had been rightly admitted?

The material sections in the Evidence Act 1950 dealing with this point are sections 61-65, and they are as follows:

61. The contents of documents may be proved either by primary or by secondary evidence.

62. Primary evidence means the documents itself produced for the inspection of the Court.

63. Secondary evidence includes:-

(a) oral accounts of the contents of a document given by some person who has himself seen it.

64. Documents must be proved by primary evidence except in the cases hereafter mentioned.

65.(1) Secondary evidence may be given of the existence, condition or contents of a document admissible in evidence in the following cases:

(a) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect produce it in reasonable time;

(2)(a) In the cases referred to in sub-section (1) (a), (c) and (d) any secondary evidence of the contents of the document is admissible.

Dealing with the admission of secondary evidence, the Privy Council in the case of *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon*[2] said at page 102:

"The original of this deed was not produced and their Lordships, during the argument, declared their opinion that its non-production was not sufficiently accounted for to allow of secondary evidence being given of its contents. It appeared upon the plaintiff's evidence that the original deed had been delivered to the guardian Moonshee Kolumoodeen, but this person was not called as a witness, nor was his absence explained. It is to be observed that, although the document tendered as evidence, viz. what purported to be a copy of the deed from the Registry, showed that the instrument, if really executed, was signed by numerous subscribing witnesses, none of them were called to prove its existence and execution. Supposing, therefore, that secondary evidence had been admissible, neither of the two conditions required to make the copy statutory evidence of the deed by virtue of Regulation XX 1812 (section 2 Cl. 5) was complied with. It was not shown that the original was "lost, destroyed or not forthcoming", that is to say, its non-production was not satisfactorily accounted for, nor was there any proof by any of "the subscribing witnesses" that the original had been duly executed . . . . . In their Lordships' opinion, therefore, no sufficient foundation was laid for the admission of secondary evidence. Objections made with the view of excluding evidence are not received with much favour at this Board, but it is sometimes necessary for the right decision of the merits of the controversy between the parties to give effect to them."

In short, before secondary evidence could be received the condition laid down in section 65(1) (c) viz. that the original (that is the 4 X-rays) has been destroyed or lost, must be satisfactorily proved by admissible evidence, like calling the officer in charge of the X-ray Record Office. If the officer was not available then his absence should be properly accounted for. In my opinion, it is highly undesirable to allow the 1st respondent, who was being sued by the appellant and who might be

regarded as an interested party, to give hearsay evidence that the 4 X-rays had been lost or misplaced. His testimony might be treated as tainted. *A fortiori*, it might even be rejected on the ground of hearsay. This strict rule was reiterated by Lord Tenterden in *Vincent* v. *Cole*[3]:

"I have always acted (perhaps more so than other judges) most strictly on the rule; that what is in writing shall only be proved by the writing itself. My experience has taught me the extreme danger of relying on the recollection of witnesses, however, honest, as to the contents of a written instrument; they may be so easily mistaken that I think the purposes of justice require the strict enforcement of the rule."

In *Strother* v. *Barr*[4] Best C.J. said at page 1018:

"I seldom pass a day in Nisi Prius court without wishing that there had been some written statement, evidentiary of the matters in dispute. More actions have arisen, perhaps from want of attention and observation at the time of a transaction, from the imperfection of human memory, and from witnesses being too ignorant, and too much under the influence of prejudice to give a true account of it, than from any other cause. There is often a great difficulty in getting at the truth by means of parol testimony. Our ancestors were wise in making it a rule, that in all cases the best evidence that could be had should be produced, and great writers on the law of evidence say, if the best evidence be kept back, it raises a suspicion that, if produced, it would falsify the secondary evidence on which the party has rested his case. The first case these writers refer to as being governed by this rule is, that where there is a contract in writing, no parol testimony can be received of its contents unless the instrument be proved to have been lost."

Unless section 65(1) (c) of the Evidence Act 1950 is enforced strictly we may inadvertently allow secondary evidence to come in by the back door and to provide opportunity for a cover-up. Such a practice, in my opinion, would be most unfortunate and particularly so when a layman, a member of the public is suing the Government and a professional man for negligence. I am aware of what Denning L.J. said in *Roe* v. *Ministry of Health & Ors.*[1] at page 136. There Denning L.J. was commenting on professional standard as well as to have regard to the conditions in the hospitals which doctors have to work but here, we are dealing with the burden of proof in a common law tort of negligence. By insisting on strict compliance with the law of evidence, I am merely reiterating that which has always been the accepted practice of the courts in England and in this country, that only admissible evidence should be allowed in a court of law, and that secondary evidence may be admitted if the conditions set out in section 65 have been satisfied.

Applying this to the facts of this case, I would rule that the secondary evidence of the 1st respondent (D.W.1) was not admissible in evidence. I would similarly hold that the testimony of Dr. Narinder Singh (D.W.2) should also be rejected for the same reason. If the testimonies of the 1st respondent and D.W.2 were to be disregarded than in my opinion, on the evidence adduced at the trial, the respondents had failed to discharge the onus of proving the allegations that the deceased suffered these fatal injuries after he was attacked a second time following his discharge from the Casualty Ward.

For the above reasons I would allow the appeal with costs here and in the Court below. The deposit of $500.00 to be refunded to the appellant.

Appeal dismissed.

Solicitors: *Syarikat Richard Ho.*

RIMBUNAN HIJAU SDN. BHD. v. SARAWAK PLYWOOD (M) SDN. BHD.

[S.C. (Seah, Mohamed Azmi & Syed Agil Barakbah S.C.JJ.) October 1, 1984 & April 29, 1985]

[Kuching – Federal Court Civil Appeal No. 11 of 1984]

Practice and Procedure – Arbitration – Appointment of arbitrator by court – Whether interlocutory injunction should be granted – Preservation of status quo – Balance of convenience – Arbitration Act, 1952, s.13(6)(h).

The respondents obtained the right to log 261,910 acres of forest land from the Sarawak Timber Industry Development Corporation and they entered into an agreement with the appellants to subcontract a portion of the concession area for the purpose of felling and extracting merchantable timber under the licence. Disputes arose between the parties and the respondents purported to terminate the agreement. The appellants applied to the court for the appointment of an arbitrator to deal with the disputes between the parties. The learned trial judge made an order for the appointment of an arbitrator but dismissed the application of the appellants for an interlocutory injunction to restrain the respondents from doing certain acts specified pending arbitration. The appellants appealed.

Held: the main consideration is whether the *status quo* ought to be preserved and in considering this the court must determine the matter on the balance of convenience. Considering the facts and circumstances of the case, the balance of convenience did not favour the *status quo* to be preserved because it will result in the work of extracting timber in the concession area coming to a standstill. The respondents have been issued with a permit by the